Hillside Bus Corp. *and* Mario De Fina and Electrical, Production and Industrial Workers Union, Local 118, International Union of Amalgamated Novelty and Production Workers, AFL-CIO, Party to the Contract

Hillside Bus Corp., Hunter Transit Corp. and Bellrose Bus Corp.[1] *and* Mario De Fina and Electrical Production and Industrial Workers Union, Local 118, International Union of Amalgamated Novelty and Production Workers, AFL-CIO, Party to the Contract. Cases 29-CA-7605, 29-CA-7658, 29-CA-7684, and 29-CA-7685

July 26, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 8, 1981, Administrative Law Judge Joel P. Biblowitz issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief as did Respondent and the Party to the Contract. Thereafter, both Respondent and the Party to the Contract filed reply briefs to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

We adopt the Administrative Law Judge's finding that employee Mario De Fina was not discharged in violation of Section 8(a)(3) and (1) of the Act. The Administrative Law Judge, in assessing whether the General Counsel had properly set forth a *prima facie* showing that De Fina's protected conduct—the refusal to sign a Local 118 authorization card—was a motivating factor in Respondent's decision to discharge him, apparently took into consideration Respondent's defense in concluding that the General Counsel had not sustained his initial burden. Pursuant to such an analysis, the Administrative Law Judge found that De Fina was not unlawfully discharged.

To establish a violation of Section 8(a)(3), it is incumbent on the General Counsel to adduce evidence supporting his contention that an employee was unlawfully discharged. Should a *prima facie* case of unlawful discharge be shown, the burden of persuasion shifts to the respondent to establish a lawful reason for the discharge. However, in assessing whether a *prima facie* case has been presented, an administrative law judge must view the General Counsel's evidence in isolation, apart from the respondent's proffered defense. It is only after the General Counsel's *prima facie* requirement has been met that an administrative law judge must consider the respondent's defense.

Here, the Administrative Law Judge's consideration of Respondent's evidence in assessing the General Counsel's *prima facie* case, though incorrect, did not alter the ultimate outcome, with which we agree. The General Counsel did meet his burden of a *prima facie* showing sufficient to support an inference that De Fina's failure to sign an authorization card was a motivating factor in Respondent's decision to discharge him. However, we agree with the Administrative Law Judge's implicit finding that Respondent sustained its burden by presenting persuasive evidence that De Fina would have been discharged for reasons other than protected activities. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

Turning to the facts of the case, we do not agree with our dissenting colleague that Respondent unlawfully discharged De Fina. Respondent had no knowledge that De Fina had any dealings with Local 1181. De Fina's protected activity—of which Respondent was aware—consisted solely of refusing to sign a Local 118 authorization card. Although no specific finding was made by the Administrative Law Judge, we would note that three other employees were also threatened with discharge if they did not sign Local 118 authorization cards. None of those employees was subsequently discharged. Essentially the same statement was made to De Fina and the three employees; i.e., that if the employees did not sign the cards they could not work for Respondent.[3] While no specific

[1] Herein collectively called Respondent.

[2] In accordance with current Board practice, we shall modify the Administrative Law Judge's recommended Order to include interest on any moneys Respondent is required to reimburse to its employees.

[3] The following excerpts of testimony illustrate Respondent's pattern of threatening employees.

Employee Patrick Morgan (whose father was also present during this exchange) testified:

> Q. At one point were you asked to sign a card for the union?
>
> A. Yes, I was . . . I had come to work with my father, because my father works for Hillside.
>
> And that Monday morning that we both came into work the two of us were issued cards by Richard Johnson.
>
> And he told us that the cards had to be signed within a month or otherwise we would be out of work.
>
> * * * * *
>
> Q. Did you ever have any discussion with Mr. Leibowitz about any other unions?

Continued

reason was given to De Fina at the time of his discharge, Respondent maintains that De Fina was discharged "for repeated derelictions of his duties," not, as our colleague maintains, because he was late for his run on November 14. Record evidence supports Respondent's contention.

We also disagree with our colleague's conclusion that Respondent engaged in "overtly disparate treatment" toward De Fina. The record reflects that De Fina, in the past, had committed other transgressions of a not insignificant nature, in addition to his alleged deliquency on the day of his discharge. De Fina had been warned by Leibowitz for his propensity to drive too fast and also for other acts that evidenced a cavalier attitude toward the transportation of school children. Evidence of this latter characteristic is illustrated by the fact that Sister Enid Story, a principal of one of the schools serviced by Respondent, complained to the Bureau of Education for the City of New York, in addition to Respondent, of the poor service received by students who were transported on buses driven by De Fina. These acts were considered by the Administrative Law Judge in reaching his conclusion. Given the limited nature of De Fina's protected activity, we find that Respondent would have taken the same action of discharging De Fina even in the absence of protected activity.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Hillside Bus Corp., Hunter Transit Corp. and Bellrose Bus Corp., Rockaway, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Reimburse its employees for all fees, dues, or other moneys deducted from their pay for Local 118 pursuant to the provisions of the collective-bargaining agreements entered into by Respondent and Local 118 on October 29, 1979, or any subsequent collective-bargaining agreements entered into by Respondent and Local 118, with interest on any such moneys due the employees to be computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977) (see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)."[5]

2. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER JENKINS, dissenting in part:

Unlike my colleagues, I do not find that Respondent has demonstrated that it would have discharged Mario De Fina in the absence of his protected activity. Hence, I dissent from their dismissal of the complaint allegation that Respondent violated Section 8(a)(1) and (3) by discharging De Fina on November 14, 1979.

The majority specifically finds, properly, that the General Counsel "did meet his burden of a *prima facie* showing sufficient to support an inference that De Fina's failure to sign an authorization card was a motivating factor in Respondent's decision to fire him." Such a finding in unavoidable here. Thus,

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A. . . . And he came on my bus to talk to me, I had just pulled the bus in. And he told me that I would be foolish if I didn't go with the 118 Union, and that if I didn't sign the card that after 30 days I would be out of a job, and there would be no work.

Employee Jerry Cologna testified:

Q. Who asked you to sign a card?

* * * * *

Q. Was anyone else there when you spoke with Mr. Johnson?

A. I came with two other drivers. He handed me a card and said, "The majority of the men signed authorization cards for Union 118." And that if you didn't sign the card in 30 days you wouldn't be able to work here.

Employee Mario De Fina testified:

Q. And was there some discussion?

A. [Leibowitz] handed me a card.

* * * * *

Q. What happened then?

A. So I says to him, "I wanted to take the card home and look it over and check into it."

He says, "Well, you might as well sign it," he said, "I'll tell you now, the majority signed it already."

Right after that, I said to him, I says, "Well, Larry, what happens if I don't sign the card?"

He says, "Well, you can't work for me."

That's exactly what he says.

Despite Leibowitz' and Johnson's denials that any of these conversations ever took place, the Administrative Law Judge stated, "I found [Johnson's] testimony and that of Leibowitz regarding the solicitation of cards for Local 118 to be unbelievable." Thus, although the Administrative Law Judge did not directly resolve credibility with regard to these specific events, with the exception of the De Fina-Leibowitz exchange, he did make implicit credibility findings crediting Cologna and Morgan over Leibowitz and Johnson. Also, the excerpts reveal that essentially the same statements were made to all of the employees. Thus, there was no disparity in this regard with respect to De Fina *vis-a-vis* the other employees.

[4] We characterize De Fina's protected activity as being of a limited nature only because Respondent had little knowledge of the extent that De Fina was engaged in such activity. As noted, the Administrative Law Judge specifically found, and our dissenting colleague shows no basis for disputing, that Respondent's only knowledge of De Fina's protected activity was its knowledge of his refusal to sign a Local 118 authorization card. Clearly, Respondent was aware that other employees had also refused to sign Local 118 authorization cards. We agree with the Administrative Law Judge that Respondent violated the Act in its solicitation of De Fina by Leibowitz to sign a Local 118 authorization card. However, we part ways with our dissenting colleague and agree with the Administrative Law Judge that De Fina was not discharged for engaging in this single instance of protected activity of which Respondent was aware.

[5] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

the Administrative Law Judge found that "Leibowitz [Respondent's manager] had a consummate hatred for Local 1181"; that De Fina had actively supported Local 1181; and that, just 2 weeks before his discharge, De Fina had refused Leibowitz' request that he sign an authorization card for Local 118, which the Administrative Law Judge found, properly, Respondent had unlawfully supported. Indeed, the Administrative Law Judge found, and my colleagues agree, that Respondent violated the Act when Leibowitz solicited De Fina to sign an authorization card for Local 118 and by threatening De Fina with discharge if he failed to sign a card.

Two weeks after Respondent unlawfully threatened De Fina with discharge for failing to sign a card supporting Local 118, De Fina was discharged.

Despite the fact that De Fina's discharge followed close on the heels of the unlawful threat to discharge him, my colleagues adopt the Administrative Law Judge's "implicit finding" that Respondent has sustained its burden of presenting persuasive evidence that De Fina would have been discharged for reasons other than his protected activities.[6] I disagree.

De Fina, a schoolbus driver, was discharged on November 14, ostensibly because he arrived at the garage a few minutes late for his route that day. That De Fina would have been discharged for this reason absent his protected activity is wholly at odds with the credited record evidence.

The credited record evidence shows that De Fina was not literally late on November 14. Respondent claimed that De Fina was to pick up the children at 1:30 p.m., while the General Counsel presented witnesses who testified that the dismissal time was 2 p.m. The Administrative Law Judge resolved this dispute by finding that the dismissal time was 2 p.m. While commenting that De Fina should not have waited until the last minute to arrive at the garage, the Administrative Law Judge found that De Fina was not literally late. The Administrative Law Judge also credited De Fina's testimony that De Fina told Leibowitz in their predischarge conversation that the pickup time was 2 p.m. Hence it is plain that the condition upon which the alleged precipitating event for De Fina's discharge is predicated was not as Respondent contended and this knowledge must be imputed to Respondent.

Any credence that remains of Respondent's claim that it discharged De Fina because he was late for his run on November 14, when Respondent should have known he was not late, is shattered by the undisputed record evidence of disparate treatment. Thus, the record shows that, just 2 days after De Fina's discharge, his replacement driver, Chan, arrived 45 minutes *after* the children's dismissal time at PS 197, but Chan was not disciplined.

My colleagues skirt the pretextual implications that flow from Respondent's overtly disparate treatment of De Fina and Chan by addressing instead the nature and extent of De Fina's protected activity. They point out that De Fina's protected activity was solely his refusal to execute the Local 118 authorization card tendered to him by Leibowitz. Despite the fact that they find that Leibowitz' threat to discharge De Fina for his refusal to support Local 118 violated Section 8(a)(1), they excuse the overtly disparate treatment of De Fina and Chan on the basis that the protected activity that led to the threat is limited in scope.[7]

I am incredulous that my colleagues would characterize De Fina's protected activity as being of a limited nature. Refusing Respondent's demand to support an employer-supported union under threat of discharge is not only a courageous exercise of Section 7 rights but also deserves the utmost support and protection by this Board. Indeed, my colleagues' downgrading of De Fina's protected activity is anomalous when compared with their treat-

[6] My colleagues' discussion of the Administrative Law Judge's handling of the De Fina allegation leaves unanswered questions as to the basis for their decision. They point out, correctly, that the Administrative Law Judge must view the General Counsel's evidence in isolation to determine whether a *prima facie* case has been shown before considering Respondent's proffered defenses. The Administrative Law Judge did not consider the General Counsel's evidence separately, however, but found no *prima facie* case on the basis of all the evidence. Thus, the Administrative Law Judge dismissed the De Fina allegation because the "General Counsel has not sustained his burden that De Fina's action in refusing to execute the Local 118 authorization card was a 'motivating factor' in his discharge." My colleagues reverse the Administrative Law Judge in part by finding that a *prima facie* case for an 8(a)(3) discharge of De Fina has been shown. Without further explanation, my colleagues then proceed to agree with the Administrative Law Judge's "implicit finding" that Respondent sustained its burden. In view of the Administrative Law Judge's mishandling of the *Wright Line* test in evaluating the evidence, coupled with his statement that he "reluctantly find[s] that the allegation that De Fina was discharged in violation of Section 8(a)(1) and (3) of the Act should be dismissed; reluctantly because of the extremely suspicious nature of the discharge," it is not at all clear just what evidence my colleagues rely on to find that Respondent has sustained its burden of showing that De Fina would have been discharged for reasons other than his protected activity. See, for example, *Litton Mellonics Systems Division, a Division of Litton System, Inc.*, 258 NLRB 623 (1981). Hence, my dissent proceeds on the basis that my colleagues agree with the Administrative Law Judge's handling of the evidence where they have not otherwise indicated.

[7] In so finding, my colleagues also rely on the Administrative Law Judge's finding that Respondent took no retaliatory measures against three other employees who refused to sign authorization cards. They have set forth the record testimony showing threats of discharge to employees Morgan and Cologna that are essentially similar to the threat to De Fina. I agree that such threats are comparable and would find them to be violative of the Act. But I do not agree with my colleagues that the fact that Respondent carried out only one of the three threats of discharge detracts from a finding that De Fina's discharge violated the Act. Nor does this explain away Respondent's disparate treatment of De Fina and Chan, *supra*.

ment of Respondent's other coercive solicitation of authorization cards. Thus, they find, properly, that Supervisor Johnson's solicitation of authorization cards for a company-supported union violated Section 8(a)(1) and (2) of the Act and that such conduct formed the predicate for Local 118's coerced majority and for the finding that Respondent violated Section 8(a)(1) and (2) by signing a contract with Local 118 and Section 8(a)(1) and (3) by incorporating a union-security clause in that contract. In short, they recognize the serious implications of Respondent's coercing employees to sign authorization cards for a company-supported union and they give appropriate remedies. By comparison, De Fina was faced with not only a solicitation of a card for a company-supported union but also a threat of discharge by Respondent's president for refusing to sign. Apparently my colleagues place a higher premium on yielding to coercion (Supervisor Johnson's "successful" coercive solicitations) than on resisting the same coercion. Moreover, it is plain that my colleagues' skirting of the pretextual implications of De Fina's disparate treatment by downgrading his protected activity is misplaced, generally. Thus, while disparate treatment can stand alone as a factor indicating discriminatory motive, the nature or extent of the protected activity cannot explain or excuse disparate treatment.

Perhaps recognizing the fragility of its claim that De Fina was discharged because he was late for a pickup on November 14, Respondent trotted out a host of other reasons for De Fina's discharge. It cited a speeding ticket, an accident, reported reckless driving, and complaints about allegedly late pickups at the schools. The credited evidence shows, however, that the speeding ticket was dismissed, that De Fina's bus was standing still when the accident occurred, and that the complaints about De Fina's allegedly late pickups were predicated on hearsay testimony which the Administrative Law Judge did not assume to be true. Furthermore, as reported by the Administrative Law Judge, the only admonition by Leibowitz to De Fina regarding these "numerous incidents" was to "slow down." De Fina was not otherwise reprimanded or warned that his driving record might lead to discipline or discharge. Moreover, all of Respondent's concern over De Fina's alleged unsafe driving habits is tempered by the fact that Respondent continued to use De Fina to train new drivers even after these alleged incidents had occurred. And for the purposes of determining whether De Fina's discharge was discriminatorily conducted, it must be recalled that all of these incidents, for which no warnings or threats of discipline were given, occurred *before* Leibowitz unsuccessfully sought to force De Fina to sign a card for Local 118 and threatened De Fina with discharge for his refusal to sign.

Thus, there is no evidence that Respondent had a lawful reason for discharging De Fina on November 14. Instead, it is plain that Respondent grasped at the first opportunity to carry out the unlawfully threatened discharge of De Fina and that the stated reasons for De Fina's discharge are pretextual. Finally, even assuming that a lawful reason existed for discharging De Fina, I do not find that Respondent has established that it would have discharged De Fina in the absence of his protected activity, for the reasons described above.

In all other respects, I agree with my colleagues' decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten to close our business operations if our employees choose to be represented for purposes of collective bargaining by Local 1181-1061, Amalgamated Transit Union, AFL-CIO (Local 1181), or any other labor organization.

WE WILL NOT assist or support Electrical, Production and Industrial Workers Union, Local 118, International Union of Amalgamated Novelty and Production Workers, AFL-CIO (Local 118), or any other labor organization, in obtaining union authorization cards from our employees.

WE WILL NOT threaten employees with discharge for failing to apply for membership in Local 118, or any other labor organization, at a time when that Union is not their lawful majority bargaining repesentative with a valid union-security clause requiring membership in that Union as a condition of employment.

WE WILL NOT recognize any contract with Local 118, or any successor thereto, as the representative of our employees for the purpose of collective bargaining unless and until said labor organization has been certified by the National Labor Relations Board as the ex-

clusive bargaining representative of our employees.

WE WILL NOT give effect to, perform, or in any way enforce our contracts with Local 118, or any modifications, extensions, or renewals thereof, or any other contracts, agreements, or understandings entered into with said labor organization, or any successor thereto, relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until said labor organization has been certified by the National Labor Relations Board as the exclusive representative of our employees; provided, however, that nothing herein shall require us to vary or abandon any wages, hours, seniority, or other substantive feature of our relationship with our employees which we have established in the performance of these contracts, or prejudice the assertion by our employees of any rights they may have thereunder.

WE WILL NOT give effect to checkoff authorization forms executed by our employees on behalf of Local 118 until said labor organization has been certified by the National Labor Relations Board as the exclusive bargaining representative of our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL reimburse our employees for all fees, dues, or other moneys we deducted from their pay pursuant to checkoff authorizations signed by said employees, as provided for in the collective-bargaining agreements we unlawfully entered into with Local 118 on October 29, 1979, or any modifications, renewals, or extensions thereof, with interest on any such moneys due our employees.

HILLSIDE BUS CORP., HUNTER TRANSIT CORP. AND BELLROSE BUS CORP.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was heard before me in Brooklyn and Rockaway, New York, on September 15, 16, and 17 and October 1, 1980. A complaint was issued on January 10, 1980, against Hillside Bus Corp., herein called Respondent Hillside, based upon a charge (Case 29-CA-7605) filed by Mario De Fina on November 15, 1979. An order consolidating cases, consolidated amended complaint, and notice of hearing was issued on February 28, 1980, against Respondent Hillside, Hunter Transit Corp., herein called Respondent Hunter, and Bellrose Bus Corp., herein called Respondent Bellrose; at times Respondent Hillside, Respondent Hunter, and Respondent Bellrose will be referred to collectively as Respondents. This consolidated amended complaint was based upon further charges filed by De Fina: Case 29-CA-7658 on December 19, 1979, and Cases 29-CA-7684 and 29-CA-7685 on January 8, 1980. Basically, the consolidated amended complaint alleges that Respondents are a single integrated business enterprise; and that Respondents threatened their employees with the cessation of operations and other reprisals if they became members of, or supported, Local 1181-1061, Amalgamated Transit Union, AFL-CIO, herein called Local 1181, and solicited and directed its employees to sign cards designating Electrical, Production and Industrial Workers Union, Local 118, International Union of Amalgamated Novelty and Production Workers, AFL-CIO, herein called Local 118, as their respresentative for collective-bargaining purposes, while at the same time threatening their employees with discharge and other reprisals if they failed to sign cards on behalf of Local 118. The consolidated amended complaint also alleges that Respondents discharged and failed and refused to reinstate De Fina because he engaged in activities on behalf of Local 1181 and refused to sign a card on behalf of Local 118. Finally, the consolidated amended complaint alleges that on or about October 29, 1979, Respondents executed and enforced collective-bargaining agreements (containing union-security provisions) with Local 118, covering their busdrivers and mechanics, despite the fact that Local 118 did not represent an uncoerced majority of these employees. All the above actions by Respondents are alleged to be in violation of Section 8(a)(1), (2), and (3) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent Hunter, Respondent Hillside, and Respondent Bellrose are each New York State corporations engaged in providing schoolbus service pursuant to contracts that each has with the Board of Education of the City of New York, herein called the Board of Education. All the revenue derived by Respondents is pursuant to these contracts. Each of Respondents maintains (or, during the relevant period, maintained) a place of business located at 260 Beach 116th Street, Rockaway, New York, herein called the office, and at 85-15 Beach Channel Drive, Rockaway, New York, herein called the garage.

Respondent Hillside, pursuant to its contract with the Board of Education to provide schoolbus transportation, received $231.25 per day for each of its five buses for 183 school days in the 1979-80 school year, or a total of $211,593.75.

Respondent Hunter, pursuant to its contract with the Board of Education to provide schoolbus transportation,

received $235 per day for each of its 17 buses for 183 school days in the 1979-80 school year, or a total of $731,085.

Respondent Bellrose, pursuant to its contract with the Board of Education to provide schoolbus transportation, received $232.25 per day for each of its five buses for 183 school days in the 1979-80 school year, or a total of $212,508.75.

Austin Leibowitz is the sole stockholder and president of Respondent Hunter; Bonnie Milberg is the vice president of Respondent Hunter. Rosalie Gruber is the sole stockholder and president of Respondent Bellrose; Martin Gruber, husband of Rosalie Gruber, is the sole stockholder and president of Respondent Hillside; and they are the only officers of Respondent Hillside and Respondent Bellrose. Leibowitz, during the period in question, was also manager for Respondent Bellrose and Respondent Hillside. Milberg, in addition to her position as vice president of Respondent Hunter, is operations manager for all Respondents. The only other difference between the operations of Respondents is that Respondent Hillside and Respondent Bellrose transport only handicapped (physically and emotionally) children in their minibuses, while Respondent Hunter transports "normal" children in its regular sized schoolbuses.

The evidence also establishes that the Board of Education during the school year 1979 to 1980 purchased supplies valued at approximately $5 million directly from suppliers located outside the State of New York. More specifically, counsel for General Counsel introduced documents into evidence establishing two purchases made by the Board of Education during that period: the purchase of paint in the amount of $328,777 from a supplier located in New Jersey, which was delivered to the Board of Education in New York, and the purchase of school furniture in the amount of $136,264 from a supplier located in Tennessee, which was delivered to the Board of Education in New York.

Because Respondent Hillside and Respondent Bellrose each received less than $250,000 during the period in question it is necessary to determine whether Respondents constitute a single integrated business enterprise.

Respondent Hunter pays the rent for the office and garage; neither Respondent Hillside nor Respondent Bellrose has its own office space or garage. Respondent Hunter's officers and office employees (including Leibowitz and Milberg) perform all of Respondent Hillside's and Respondent Bellrose's administrative and office functions for which they each pay to Respondent Hunter a management fee of $10,000 a year. Additionally, Leibowitz hires and fires the employees of Respondent Hillside and Respondent Bellrose, as well as the employees of Respondent Hunter, and spoke to all of Respondents' employees in a speech he gave about their job duties shortly before the school year began. No evidence was adduced that any of the employees of Respondent Hillside or Respondent Bellrose had ever met Martin or Rosalie Gruber. Once a month the Board of Education mails each of Respondents a check for services performed pursuant to the contract each has with the Board of Education; all of these checks are received by Leibowitz at his office; and he deposits Respondent Hunter's checks into his bank account and he deposits Respondent Hillside's and Respondent Bellrose's checks into their respective accounts for Martin and Rosalie Gruber. Leibowitz testified that sometime between March and September 1979, Martin and Rosalie Gruber entered into an agreement with him (as discussed *supra* and *infra*) for him to (in Leibowitz' words) "run their company," to be the "overseer." Leibowitz testified that the reason for this is that the schoolbus business is such a competitive industry that employers in this industry commonly share people and facilities in order to cut costs. Additionally, Leibowitz owns a gas station which provides gasoline to the buses of all Respondents.

Respondent Hillside and Respondent Bellrose each own five minibuses; Respondent Hunter owns 17 regular size schoolbuses. Respondent Hunter pays the rent for the garage and Respondent Hillside and Respondent Bellrose each reimburse it for five twenty-sevenths of the cost of the rent; i.e. proportioned to the number of buses owned by each. Because the minibuses of Respondent Hillside and Respondent Bellrose are meant for handicapped students, there is no interchange between these buses and the buses of Respondent Hunter. There is interchange of employees among Respondents, however, and, in fact, De Fina began his employ with Respondent Hunter and, within a few weeks, he was transferred to Respondent Hillside. Even after his transfer to Respondent Hillside, on occasion he performed a run for Respondent Hunter.

Richard Johnson, the dispatcher, acts in that capacity for all Respondents. Respondent Hillside and Respondent Bellrose each employ a mechanic; Respondent Hunter employs a larger number of mechanics and if Respondent Hillside or Respondent Bellrose requires one of Respondent Hunter's mechanics, he will be lent to that Company for the required time and Respondent Hillside or Respondent Bellrose will reimburse Respondent Hunter for the mechanic's time.

Respondents each signed separate identical collective-bargaining agreements with Local 118. Johnson solicited authorization cards for Local 118 from employees of all Respondents, and all three agreements were given to Leibowitz by a representative of Local 118.

The Supreme Court in *Radio and Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965), set forth the criteria for determining whether several nominally separate business entities constitute a single integrated business enterprise: interrelation of operations, common management, centralized control of labor relations, and common ownership. It is clear that all these criteria, except the last one, are present herein. Respondents all operated from the same premises and with the same management; Leibowitz handles labor relations policy for all Respondents (as will be seen, *infra*, he discharged De Fina at a time when he was employed by Respondent Hillside) and there is an interrelation of operations in that employees (such as De Fina) transfer from one of Respondents to another. Martin and Rosalie Gruber are as absentee as owners could be—they do not even receive the checks from the Board of Education, and it appears that they

have never even met any of their employees. Although they own Respondent Hillside and Respondent Bellrose and Leibowitz owns Respondent Hunter, I find that all three Respondents constitute a single integrated enterprise. *Blumenfeld Theatres Circuit, a Partnership, et al.*, 240 NLRB 206 (1979); *Scalera Bus Service, Inc.*, 210 NLRB 63 (1974); *Floyd Epperson (United Dairy Farmers, Inc.)*, 202 NLRB 23 (1973); *Transportation Lease Service, Inc. and Allied Stores of Penn-Ohio, d/b/a Pomeroy's Inc.*, 232 NLRB 95 (1977); *The Pulitzer Publishing Company*, 242 NLRB 35 (1979).

As stated, *supra*, all revenue received by Respondents is pursuant to their contracts to provide schoolbus transportation for the Board of Education. In order to settle a lawsuit that developed from a labor dispute, the Board of Education, prior to the beginning of the 1979-80 school year, entered into an agreement with the schoolbus companies it had contracted with to provide schoolbus transportation during the 1979-80 school year. This agreement provided, *inter alia*, for the establishment of a master seniority list of those drivers, mechanics, dispatchers, and matrons "who were employed as of February 9, 1979, under a contract between their employers and the Board for the transportation of school children in the City of New York, who are furloughed or become unemployed as a result of loss of contract or any part thereof by their employers, or as a result of a reduction in service directed by the Board during the term of the contract." Employees who were hired by schoolbus companies for the 1979-80 school year pursuant to this master seniority list were to be paid the salary paid by the New York City Transit Authority on July 5, 1979, to drivers or mechanics (whichever is applicable). In addition, such employer who has employed a driver, dispatcher, or mechanic from this master seniority list must pay $82 a month, on a 12-month basis, as a welfare contribution for each of these employees, together with a weekly contribution of $27.15 to Local 1181's pension fund for each of said employees. (Local 1181 had represented the employees involved in the labor dispute and had instituted the lawsuit in question.)

This agreement also provided that contractors providing five vehicles or less were not subject to its provisions; therefore, Respondent Hillside and Respondent Bellrose were not bound to hire from the master seniority list and did not do so. Because Leibowitz, during the 1978-79 school year, operated another schoolbus transportation company (London Bus Company) and the agreement also provided for preference in employment for a company's prior employees, Respondent Hunter, under the agreement, employed only one employee, Patrick Morgan, from the master seniority list and made the required payments for him.

Respondents would argue that, even though I have found Respondents to constitute a single integrated enterprise, because of the nature of Respondents' business and the control the Board of Education exercises over Respondents as described, *supra*, the Board should not assert jurisdiction herein. I disagree.

In *National Transportation Service, Inc.*, 240 NLRB 565 (1979), the Board reexamined the two-point test it had been using in determining whether to assert jurisdiction in situations such as is present herein. In that case the Board decided that it would no longer consider the "intimate connection" test, stating:

> We conclude that the first aspect of this test—i.e., whether the employer would be able to bargain effectively about the terms and conditions of employment of its employees—is by itself the appropriate standard for determining whether to assert jurisdiction in situations such as that presented in the instant case. Once it is determined that the employer can engage in meaningful collective bargaining with representatives of its employees, jurisdiction will be established.

The only evidence adduced of any "control" by the Board of Education regarding the labor relations policies of Respondents was the terms that the Board of Education required its contractors to comply with pursuant to the agreement referred to, *supra*, between Local 1181 and the Board of Education. Of the approximately 32 employees employed by Respondents only 1 employee was covered by the provisions of this agreement and the only requirements Respondent Hunter had toward him was to pay him a certain minimum wage[1] and to make a specified periodic contribution for his welfare and pension plan. I find that this is not nearly enough "control" of Respondents' labor relations policy to prevent Respondents from being "able to bargain effectively about the terms and conditions of employment of its employees." *National Transportation, supra*. Even with this restriction, Respondents could, *and did*, engage in collective bargaining with Local 118. I therefore find that Respondents are a single integrated business enterprise engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

II. THE LABOR ORGANIZATIONS INVOLVED

Respondents admit, and I find, that Local 118 and Local 1181 are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *September 6, 1979, Speech*

On September 6,[3] 4 days before school started, Leibowitz made a speech to all of Respondents' employees at Temple Beth El in Belle Harbor, New York. At this meeting, the purpose of which was the orientation of the employees to Respondents' operations, Leibowitz thanked De Fina for assisting him by training a number of Respondents' drivers in obtaining their number 2 li-

[1] No evidence was adduced as to whether the minimum wage rate was more or less than the wage rate provided in Respondents' contracts with Local 118.

[2] *Jay Dee Transportation, Inc., et al.*, 243 NLRB 638 (1979); *We Transport, Inc., et al.*, 240 NLRB 755 (1979); *Soy City Bus Services, Division of R. W. Harmon & Sons, Inc.*, 249 NLRB 1169 (1980); *Kal Leasing, Inc.*, 240 NLRB 892 (1979); *R. W. Harmon & Sons, Inc.*, 250 NLRB 172 (1980).

[3] Unless otherwise indicated, all dates referred to are for the year 1979.

cense, which allows them to drive a large schoolbus, as well as a minibus. In addition, Leibowitz told the employees of Johnson's duties as dispatcher (this will be discussed separately, *infra*) and spoke about the possibility of the employees joining a union. A number of employees, together with Leibowitz, Johnson, and Milberg, testified regarding the content of Leibowitz' statements.

De Fina testified that Leibowitz said, "The first man that joins the union, I'll close this shop. I don't want no unions in here," although he did not mention any specific unions. A slight discrepancy appeared in his testimony when I asked De Fina if Leibowitz also spoke of the difficulties he had earlier in the year with the Local 1181 strike and violence. De Fina answered, "He didn't talk about any violence nor did I know he was threatened." When I repeated the question, De Fina answered, "[H]e did not mention any violence. He mentioned the strike, the trouble he had at London Bus Company." Employee Albert Ortiz testified that Leibowitz said that "he would have no union . . . he didn't want somebody to try to get involved in any Union," and that if someone brought in a union "he would be brought in front of the drivers." Ortiz, though admitting that his memory on this subject was less than exact, testified that Leibowitz said that if somebody tried to bring in a union "he would prefer to close the place down or something like that. But he would rather prefer that we not join a union."

Employee Salvatore Colognna, who, together with Morgan, did not join Local 118 until the 30th day after the collective-bargaining agreement between Respondents and Local 118 was signed, testified that Leibowitz said that he did not want Local 1181 in the shop and that if anybody brought in Local 1181 or authorization cards for Local 1181 he would bring them before the other employees and tell them, "This is the man that closed the gates on the bus company."

Milberg also testified about this meeting, although "testified" is probably not a proper term for her actions while on the witness stand; rather, she spent most of her time on the witness stand attempting to explain away the contents of her affidavit, which states, *inter alia*, "At the meeting he [Leibowitz] told the drivers that if they brought any union in, he would close down the shop and the employees would lose their jobs." After many attempts at evasive action Milberg finally admitted that what Leibowitz said was "something to this effect" and "that he would probably have to close his shop, something like that" if the union came in.[4]

Johnson testified that Leibowitz said that under no circumstances would he have Local 1181 in the Company: "He said that the union had been known for a lot of violence and they were the ones that held us up for 13 weeks on account of the strike. They were very violent people, and he didn't want any of the employees hurt, because he knew the way the union was." Johnson was then asked:

> Q. Did he say what would happen if the employees tried to bring in 1181?
>
> A. He said he would close the doors.

Johnson further testified that sometime between early September and late October he had a conversation in "general terms" with Leibowitz about unions: "We discussed 1181, the violence that went on with 1181, the numerous things about 1181 in particular . . . he was telling me that 1181 was a shame. And I said there are other Unions besides 1181. And it went on no further than that."

Leibowitz testified that during the 1978–79 school year he was affected by the labor dispute that Local 1181 was engaged in, even though the employees of his company at that time (London Bus Company) were not represented by Local 1181. He testified that this dispute shut down his company's operation for a period and resulted in threats and violence. His testimony as to what he said at this meeting is as follows:

> Well, I'm—I may have said that—to the effect that rather than have the violence that we had and because the Board of Education decided to amend these contracts and force the union, 1181, upon companies that were not unionized, I saw no reason why we should stay in business and create an atmosphere that will harm everyone here and I said that—something to the effect that: I feel that I have a lot of respect for all of you and most of you are my friends and we've worked together all a long time and rather than fight a war, I will just close up because of the violent threats to my family.
>
> I said that because of the violence that occurred, and because of the situation that was reported in the newspapers, and the threatening phone calls to my life and my children—fire bombings—the general upheaval—I said that if 1181 tried to unionize us, and I know that a lot of people have come to me and told me that you do not want to be involved with 1181—
>
> Rather than have violence, I will have to just close the door.
>
> Q. Under what circumstances would you close up?
>
> A. Well, if we were forced to take Local 1181, because of the violence that was created . . . .

B. *Collective-Bargaining Agreement With Local 118*

Johnson testified that sometime in or about October he was speaking with drivers for another schoolbus transportation company, M & E Winters. These drivers informed Johnson of the existence of Local 118 and gave him the telephone number of Local 118.[5] Johnson testified that he then spoke with a number of the drivers of Respondents "and I told them that I think Larry might go along with the union because I think it is better for us and he might go along with this rather than go along with 1181."

The following week Johnson called the telephone number he was given for Local 118, and spoke with Charles Valvo, representative of Local 118. Johnson

[4] It should also be noted that during Milberg's testimony I had to warn her to cease looking at Leibowitz prior to each of her answers.

[5] Johnson testified that he is not certain whether the employees of M & E Winters are represented by Local 118. M & E Winters is owned by Johnson's wife's sister.

asked him if he could bring him some authorization cards, as he had spoken with some of the employees and they indicated that they would like to join Local 118. On Friday, October 26, at or about 4, Johnson saw a car pull up and park outside the garage; Johnson went out to the car, and Valvo handed him the Local 118 authorization cards and left. Johnson then handed these Local 118 authorization cards to the employees who were at the garage and told them to read the cards. Those drivers who were not present at the garage that afternoon were given cards by Johnson the following Monday. Johnson testified that he gave these authorization cards to 22 of Respondents' employees and may have given them to 2 other of Respondents' employees. A large majority of these cards are dated October 26. Johnson did not give Local 118 authorization cards to a number of employees, including De Fina, whom he did not see that afternoon or Monday morning.

On Monday, October 29, Valvo drove up to the garage between 10 a.m. and noon. Johnson went out to Valvo's car, handed him the authorization cards he had collected Friday afternoon and that morning (22 in number), and told him that the cards represented a majority of the employees of each Respondent. Valvo said that he would take care of it. Johnson testified that after that day he had no other involvement with Local 118, other than his being a member of it, and that his activity in handing out Local 118 authorization cards was his own idea—Leibowitz never instructed him to do it.

Leibowitz' testimony continued on from that point of time; he testified that his first contact with Valvo was a telephone call from him: "I think I got a phone call saying: I have got a bunch of cards signed here, and let's have a contract, or something to that effect." When I asked Leibowitz how long prior to the signing of the collective-bargaining agreement with Local 118 (October 29) he received the phone call from Valvo, the best that he could estimate was that it occurred a week or two before the collective-bargaining agreement was signed. He testified that Valvo came to his office and told him, "I represent the Union. I have cards here and here is a contract." Valvo handed Leibowitz three identical contracts, one for each of Respondents. Leibowitz did not look at the authorization cards and asked Valvo, "What do I do now, I never had this before?" Valvo answered, "Read it, let me know." Leibowitz then testified as follows:

> A. I took it home and I did some deep soul searching and I felt that I had a responsibility to the people who worked for me a long time and if I didn't sign the contract, I don't know exactly what would happen, maybe the Board of Education would take the contract for not running, and these fellows would be out of a job, I would lose my business, so I figured that it was [a] business decision, I said, "Fine, I will sign it."

Leibowitz signed the contract on behalf of Hunter, and gave Rosalie and Martin Gurber the contracts that Valvo left with him for Respondent Hillside and Respondent Bellrose and told them to make their own decision on what to do. They signed the contracts for Respondent Hillside and Respondent Bellrose. All three contracts are signed and dated October 29.

Patrick Morgan testified that he and his father, an employee of Respondent Hillside, were handed Local 118 cards by Johnson in the parking lot outside of the garage. Morgan placed the date of this as "maybe the first or second of November" and that it was on a Monday.[6] Johnson told them that the cards had to be signed within a month or they would be out of work. Morgan, who was a member of Local 1181 at the time, took the card, but did not sign it; the same was true for his father. A few days later Valvo came to the garage and spoke to Respondents' employees about the benefits contained in the contract. Morgan testified that De Fina was one of the employees present. According to Morgan's testimony, Leibowitz informed the employees, "This is a union shop and anybody that doesn't sign the cards within 30 days would be out." On November 26, Morgan and Sal Colognna went to Leibowitz' office and told him that they wanted to sign the Local 118 cards. Leibowitz told them, "You're doing the right thing," and they signed membership cards and dues-checkoff cards on behalf of Local 118.[7]

Colognna, a driver employed by Respondent Hunter, testified that on Monday, October 29, at or about 7 a.m., Johnson approached him and handed him a Local 118 authorization card and said that a majority of the men signed authorization cards for Local 118 and if he did not sign the card he had 30 days under New York State law to continue working for the Company. Colognna did not sign the card on that day. He further testified that on Thursday, November 1, Local 118 held a meeting at Respondents' garage with Respondents' employees. De Fina was on a run at the time and was not present for this meeting. Valvo informed the employees that they had a contract signed with Respondents as of October 29, Colognna asked how that was possible since he had only received his card on October 29, and Valvo answered that he had the contracts and he had signed authorization cards. Valvo then discussed the benefits set forth in the contract. Colognna further testified that on November 26, Leibowitz asked him if he were going to join Local 118 within the required 30 days; Colognna asked where the cards were and Leibowitz said they were in Respondents' office. On November 28,[8] he and Morgan went to the office and said, "we are here to sign the card." Leibowitz asked Morgan, "Does 1181 know you are signing the card," and Morgan said, "Yes." They signed the forms joining Local 118.

Driver Albert Ortiz testified that, after Valvo spoke to Respondents' employees on the bus (he places the date as during the week of October 29), Leibowitz told the em-

[6] I find it reasonable to assume that this occurred on Monday, October 29.

[7] Morgan testified that a few days earlier he met Leibowitz in the garage and Leibowitz told him that he would be foolish if he did not sign with Local 118, and that, if he did not do so after the 30 days, he would be out of a job.

[8] It is noted that Morgan testified that this occurred on November 26. Neither card is in evidence, but Morgan's father, James, signed his card on November 26. Regardless, the difference is insignificant.

ployees that he had signed the contract with Local 118 and that the employees who had not already signed a card for Local 118 had 30 days in which to do so or they could not work for Respondents.

As Johnson admits to soliciting a majority of the cards on behalf of Local 118 it is necessary to determine whether Johnson is a supervisor within the meaning of the Act. The General Counsel alleges that he is a supervisor, while Respondents allege that he is employed as a dispatcher who simply transmits orders from Leibowitz and Milberg.

During the 1979–80 school year Johnson's weekly salary was $361; the weekly salary set forth in Respondents' collective-bargaining agreements with Local 118 for that period was $250; some drivers, for reasons unexplained at the hearing, earned up to $311 a week; and Patrick Morgan earned $323. During the period in question Respondents employed approximately 27 drivers and 5 mechanics.[9] Johnson had previously worked for Leibowitz for 11 years, last at London Bus Company, and testified that he was hired as a driver-dispatcher and beginning in September he, like the other drivers, had a regular run: "I would normally go on the run unless I was doing something in the dispatcher capacity, then I would send someone else to do the run." Johnson could only estimate that he actually performed his run from 30 to 60 percent of the time; when he had dispatching duties to perform he usually chose a mechanic to substitute for him—"Anyone I could get, whoever was available."[10]

Johnson also testified that in September, prior to the beginning of the school year, Leibowitz told him that his job was to dispatch the buses, get the drivers out on the buses, and make sure the children get to school safely and get home safely, but that he did not have the power to hire or fire employees; Leibowitz and Milberg were the only ones who could hire or fire. In his testimony Johnson described his duties as a dispatcher as "[m]aking sure the runs go out, the children got to school on time, making sure the buses went out on time." He testified that if anything unusual happened Milberg would handle it, and "if it is something small, then I handle it." When asked to give an example of what he meant by "something small," Johnson testified:

> Another example would be that if a parent would call me and say what time are the children being picked up and so on and so forth, I would answer her and I would say what time do you get to this particular spot on a particular day, and give the parent an answer; or a child may be involved with a parent calling up and saying my child hasn't been picked up. And I would check the route and see if he was on the route, and if he was on the route determine why the child was not picked up. It might be he wasn't on that route and the parent made a mistake or we made a mistake or the school made a mistake, and try to correct that in this particular case.

Johnson testified that when there was a bus breakdown, the driver (of any of Respondents) would call him and he would dispatch an available mechanic to assist the driver,[11] "my primary job is to make sure that the children get to school safely and as close to being on time as possible." Johnson further testified that he sometimes received complaints from parents that their school children were not picked up or were picked up late and he would ask the driver about the situation and then contact the parent with an answer; he never reprimanded any drivers.

Johnson also testified that Leibowitz did not spend a lot of time at the garage: "He would come down every once in a while . . . . He might not come down for a week, he might come down three or four days in the next week."

Leibowitz testified that in early January 1980, Respondents hired a general manager for the garage. When he was asked who "ran the show" at the garage prior to that time, he answered, "I did. It was over the telephone kind of thing. It was very difficult." He also testified that, like Milberg, he spent most of his time at the office, so he assigned "one of my drivers"—Johnson— "to sit in the office in between his routes and help me," even though Johnson drove an assigned run every day, and although Leibowitz did not know what run it was. Leibowitz testified that at the meeting of September 6 with the employees of all Respondents (discussed above, *supra*) he told the employees:

> Mr. Johnson's duty is not hiring and firing. He will be given orders by me as to dispatching buses between his driving job. I said Bonnie Milberg's job is that she will be a liaison between the Board of Education and us; she will make run changes; she had a right to hire and fire, so if she tells you people that she wants something done, this is the person who you better listen to.

Milberg also testified regarding Johnson's supervisory status. In an affidavit previously given to the Labor Board she referred to Johnson as "dispatcher, manager." In her testimony she first stated that Johnson was the "dispatcher." After being shown her affidavit she was asked if in the affidavit she described him as "dispatcher, manager" of the garage; she answered, "I might have, I don't know. To me, dispatcher and manager, I don't get

[9] The testimony was that Gregory D'Aquiar "was in charge of the mechanics"; however, there is no allegation that he is a supervisor within the meaning of the Act.

[10] His testimony at another point is somewhat different:

> Q. How would you decide which mechanic would go out on that run if you were tied up with your dispatching job?
>
> A. Depending on what they were doing in the garage.
>
> Q. You would see what is happening and then you would make a decision as to Greg or Scott taking a run that afternoon; is that right?
>
> A. Yes.

[11] At this point an inconsistency appears in Johnson's testimony. At first he testified, "A breakdown I would get a call, and I would tell the mechanic and dispatch the mechanic out to help the driver." Shortly thereafter he testified, "I wouldn't send out a mechanic, I maybe said that wrong. We have a mechanic there who was in charge of the other mechanics and I would tell him about the breakdown and information and so forth and he would let the mechanic go."

involved in that." Milberg's affidavit also states, "Richie Johnson has the power to hire, fire, and discipline employees." In answer to a question as to whether Johnson had the power to hire, fire, or discipline employees, she testified, "Well, not really." When I asked her why, in her affidavit, she stated that he had these powers, she stated, "I just felt he did," although he never hired, fired, or disciplined any employee, nor did he recommend to her that an employee be disciplined. She also testified that Johnson's responsibility is to make sure that all the buses go out to the schools on time and that neither she nor Leibowitz spend much time at the garage. When she was asked whether Johnson was in charge at the garage, she answered, "Yes, he was there." When she was again shown her affidavit, which states, "Johnson has the authority to make decisions about scheduling and resolving conflicts without consulting with Larry Leibowitz," she testified, "But it doesn't say anything about me." Milberg testified that Johnson did not have the authority to make schedule changes on his own—he always called her: "If it is something ridiculous he tries to work it out. If it is a major thing, it is scheduling, it is important, he calls me." When she was asked to give examples of "ridiculous" things that Johnson could work out himself, she first testified, "Stupid things that happen down in the garage," and then, after much difficulty, the only example she could testify to was settling the problem of a broken window in the garage. Shortly thereafter she testified that Johnson "is the manager of the people down at the garage," and, in answer to the question, "He was the only one in management that the employees saw or dealt with," she testified, "Well, they all had to deal with Richie, because Richie was there with the buses." Milberg also testified that prior to the start of the 1979–80 school year she prepared a schedule of the runs for each of Respondents' buses, with Johnson's assistance.

De Fina testified that, at the September 6 meeting of all the employees of Respondents, Leibowitz introduced Johnson to the employees and said that Johnson would be general manager and dispatcher of the garage, and "whatever he says, goes." Prior to this, while De Fina was assisting Leibowitz in preparing for the 1979–80 school year, Leibowitz introduced him to Johnson and told him that Johnson would be in charge of the bus garage. De Fina testified that Johnson was in charge of dispatching the buses, receiving telephone calls from parents of school children serviced by Respondents, receiving calls from drivers whose buses broke down, and receiving telephone calls from Leibowitz; Johnson drove a run only to cover for a driver who was absent, and, according to De Fina's testimony, Johnson never hired or fired anyone.

Patrick Morgan testified that Johnson did not have a regular run of his own and, as dispatcher, he was the person you went to if you had a problem with your run or your bus and he would work it out with you. Morgan testified to a situation where, at the start of the school year, he had 75 or 76 children on one of his runs, whereas normally drivers are only allowed 72. He reported this to Johnson, who told him, "Don't take more than seventy two children. The others will have to find other ways of getting to school." On one occasion his run was changed, and Johnson informed him of the change, although he does not know who made the decision to change his run.

Ortiz testified that at the September 6 meeting Leibowitz informed the employees that Johnson would be the dispatcher and would be "running the garage." Colognna testified that, at the September 6 meeting with Respondents' employees, Leibowitz told the employees that Johnson was the dispatcher and the man in charge of dispatching the buses and if any of them had a problem they should speak about it to Johnson first before seeing him. He also testified that Johnson did not drive a schoolbus run, he only drove buses to have glass installed in them. He testified that Johnson's job was to dispatch the buses and answer telephone complaints from parents or calls from schools. When Colognna voiced complaints to Johnson about the overloading of his bus, Johnson went to the office about the complaint. When a student and parent complained about something Colognna had done, Johnson gave Colognna a note to see Milberg. Colognna also testified that he knew of no situation where Johnson hired or fired any employee. Johnson informed him of changes in his runs, but he believes that Leibowitz or Milberg made the decisions.

C. *Discharge of De Fina*

De Fina began his paid employment with Respondent Hunter on the day school began, September 10, as a busdriver. When he first applied for the job, in early August, Leibowitz asked him if he had a number 2 license, and De Fina said that he did; Leibowitz asked him if he could train some of Respondents' other drivers so that they could obtain number 2 licenses, and De Fina agreed to do so. Between that date and September 10 (and thereafter) De Fina trained a number of Respondents' drivers in order for them to obtain a number 2 license without being paid for his time in doing so. As stated, *supra*, during his speech to Respondent's employees on September 6, Leibowitz thanked De Fina for this assistance he gave to him.

De Fina began his employment with Respondent Hunter. About 2 weeks later Respondent Hunter was required to employ a driver pursuant to the settlement agreement between the Board of Education and Local 1181, discussed *supra*, and, at that time, De Fina was transferred to the employ of Respondent Hillside, where, together with a matron, he operated a minibus. (The minibuses transport handicapped children, with the assistance of a matron.) De Fina testified that on October 26[12] he met Leibowitz in the garage and Leibowitz asked him to come to his office when he finished his run. De Fina was to drive home a fellow employee, Danny Thurman, and before leaving work he asked Thurman to wait in the car for him while he went to see Leibowitz in the office. (Thurman did not testify at the hearing.) When De Fina arrived at Leibowitz' office another driver, Bill Sadattie, and a mechanic (whose name De Fina did not recall) were present (neither testified at the

[12] De Fina originally testified that the incident occurred on September 26. Upon being shown his affidavit given to the Labor Board, he testified that the incident occurred on October 26.

hearing). According to De Fina's testimony, Leibowitz handed him a membership card for Local 118 and asked him to sign it. De Fina said to Leibowitz, "Larry, you're the one who told me you didn't want no unions. You're the one that said, 'The first guy that joins the union, I close the shop.'" Leibowitz then said, "Well, I have the lesser of the two evils. I'm not going to have 1181 tell me how to run my business or dictate to me." De Fina then told Leibowitz that he wanted to take the card home with him to check into it, and Leibowitz said, "Well, you might as well sign it, I'll tell you now, the majority signed it already." De Fina asked Leibowitz what would happen if he did not sign the card and Leibowitz said, "You can't work for me."

De Fina further testified that Leibowitz then looked out of the window and asked De Fina who was in his car; De Fina said that it was Thurman and Leibowitz instructed one of his men to get him and bring him to his office. When Thurman came into the office Leibowitz handed him an authorization card for Local 118 and Thurman said that he would like to think it over and return the card on Monday. Leibowitz told him to sign it "now," which he did. After that, De Fina and Thurman left. Leibowitz denied that this ever occurred and testified that he never spoke to De Fina about unions in October or November.[13] Driver Albert Pezzella, Johnson's son-in-law, testified that on October 29, at the garage, he observed Johnson handing a card to De Fina saying, "These are the union cards," and De Fina took the card, saying, "What do you want me to do with it?"

De Fina testified that this incident with Leibowitz made him angry and he called Local 1181 and informed it of Respondents' operations. Additionally, together with other of Respondents drivers, he spoke with Respondents' drivers in a restaurant three or four blocks from Respondents' garage, telling them that Local 1181 was a better union for them than Local 118. Sometime on or about November 1, at or about noontime, two organizers of Local 1181 came to Respondents' garage with a loudspeaker and spoke with Respondents' employees. About 5 minutes later Leibowitz drove up and shook hands with these two men, walked inside the garage with then, stayed for a few minutes, and came outside. De Fina testified that when they came outside the Local 1181 organizers said to Leibowitz, "No deal, Larry, no deal." After that, some of Respondents' employees, including De Fina, spoke to the Local 1181 organizers. They stayed for about 2 hours and left. Morgan testified that this visit to the garage by the Local 1181 organizers occurred near the day that Valvo spoke to Respondents' employees on the bus. According to Morgan's testimony, these Local 1181 organizers spoke to Respondents' employees without a loudspeaker and only a few of the employees spoke to them.

The next day of importance herein is November 14, the day De Fina was discharged. There are few credibility issues regarding the events of that day; the major credibility issue involves the afternoon dismissal time at PS 197. De Fina testified that on November 14 he left the garage with his matron, Rose Schwally, for his first pickup, which was about 7:20 or 7:30 a.m. After making all his pickups he dropped off the children at two schools at or about 8:40 a.m. and returned the minibus to the garage at or about 9. That day he noticed a piece of paper posted in the garage stating that beginning November 15 he would have an additional run—a midday run—between his morning and afternoon run. When he saw the notice he informed Schwally that they would have an additional run beginning the next day. He then went to MacDonald's three or four blocks away where he had breakfast with Schwally. Schwally left at or about 9:15 and drove home. Between that time and 1:30 p.m. when he left MacDonald's to walk to the garage, he stayed in MacDonald's, he was in his car listening to the radio, or he may have spent some time in the garage; he was not entirely certain. He did testify that he arrived back at the garage at 1:35. When he did not see Schwally he asked those present in the garage if anybody had seen her and he was told that she had gone out on the De Fina-Schwally afternoon run with Johnson. One of the matrons told him to call Leibowitz, which he did. Leibowitz asked him what time he was supposed to pick up the children at PS 197 and De Fina said "2:00." Leibowitz said, "What do you mean, 2:00," and De Fina told Leibowitz that was the time he picked up the children every day. Leibowitz then said, "Go home, you're fired, I'll mail you your check."

Schwally, who, like the other matrons, is employed by Professional Detail Service, which provides matrons to Respondents and other schoolbus transportation companies with contracts with the Board of Education, and is a member of Local 1181, testified that De Fina picked her up at the MacDonald's at 7:30 a.m.; their first pickup was at 7:40. Their morning run finished at or about 8:45 a.m. (According to Schwally's testimony, she and De Fina were given an additional run—the midday run—which was supposed to begin the following day—November 15.) De Fina parked the minibus at the garage and drove Schwally to MacDonald's where her van was parked, and she drove home. Schwally testified:

> Because he said he had a lot of things that he had to clean up that day. He had to go home because we were starting the midday the following day, and he had a lot of things that he had to take care of while he had the time. Because once we started the midday we wouldn't have time to go home and do it.
>
> I went home and I reported back to the garage at 1:30, 1:25, 1:30.

She testified further that 1:25 to 1:30 was the time she usually met De Fina at the garage and when she did not see him she asked Johnson where De Fina was, and Johnson answered, "I would like to know where he is myself. He was supposed to do a midday today." Schwally said that the midday run was supposed to start the next day and Johnson said, "Well, he was supposed to do it today. James Morgan was supposed to go with

[13] One other of Respondents' employees, mechanic Edgar Lewis, testified that Leibowitz, in the presence of Johnson, gave him a Local 118 authorization card to sign on October 26, which he did. Because his testimony is extremely confused I have not credited it, and therefore it will not be recited in its entirety.

him today to show him the midday." Schwally said, "I know that Mario didn't know anything about that. And how could James go on my bus without me being on the bus. You can't do a midday without the matron." At that point the telephone rang and Johnson answered it and handed it to Schwally saying, "It is for you." She took the telephone and Leibowitz asked her, "What time do you go out on your afternoon run?" Schwally answered, "Just about now." Leibowitz asked, "What time are you supposed to be at the school" (PS 197), and Schwally answered, "Two o'clock."[14] Leibowitz then said, "Put Richie on the phone. You are going to have another driver this afternoon." Schwally gave the telephone to Johnson, who spoke with Leibowitz; when he hung up the phone, he said, "I'm going to do your run with you." Schwally asked, "Why not wait for Mario, he will be here any minute. We are not late." Johnson said, "Well, Larry wants me to do the afternoon run with you. Schwally then said, "Well, that doesn't make much sense, because we are going to be down there too early. Why don't we wait here for Mario?"

Schwally testified further that she and Johnson left the garage about 1:30 or 1:35 (she testified that she and De Fina had left the garage "many times" later than that for the PS 197 run) and arrived at the school on time although the children were outside the school, with the teachers, when they arrived. According to Schwally's testimony, while they were walking toward the bus and sitting in the bus she asked Johnson what was happening, and Johnson said, "I don't know what has gotten into Larry lately. I worked with him for many years and he has always been very reasonable, but I don't know what is happening to him lately." Schwally said, "Well, why not wait for Mario," and Johnson said, "No. Look, Larry is being very unreasonable. Let's just do it and maybe things will calm down by the afternoon. Maybe Mario will be able to meet us at the school." Johnson denied this conversation.

Schwally also testified that the following day while she was at the garage waiting to go on the afternoon run with her new driver she asked Johnson if De Fina would be returning to Respondents' employ and Johnson said that he did not know. Schwally asked why De Fina was let go and Johnson said that Leibowitz had been having a lot of problems with De Fina, and had gotten dozens of letters of complaints about De Fina. Schwally asked why she was never informed of these complaints and to what complaints Johnson was referring. Johnson said, "Oh, there are lots of them." Schwally asked him to name one, and Johnson left without answering. A day or two later Schwally again asked Johnson for the specific complaints about De Fina's work and Johnson told her, "I don't want to talk about it." Schwally said, "Richard you know what this is all about just as well as I do. It is about the union." Johnson did not reply. Johnson does not recall such a conversation. Schwally testified that dismissal times are discussed among the driver, matron, and teachers and they all agree on a time that is close to the school's dismissal time while, at the same time, convenient for all.

Milberg testified that dismissal time for PS 197 for De Fina's run, during the period in question, was 1:30. However, in the affidavit she gave to the Labor Board, she stated that dismissal time was 2 o'clock. Although Milberg testified extensively on this subject, because I found her to be a witness completely lacking in credibility (as discussed *supra* and *infra*) I will not bother to recite her testimony on the subject.

Johnson testified that on November 14 between 12 and 12:30 he received a call at the garage from Leibowitz, who asked where De Fina was; Johnson told him that De Fina was supposed to do a dry run on a midday run that day,[15] but he did not know where De Fina was. Leibowitz said, "I will talk to you later." Johnson testified further that Schwally came to his office in the garage at or about 1:20 or 1:25 and asked where De Fina was and Johnson said that he did not know; Schwally told him, "He must be here, we are supposed to be going out on a run." At that point Leibowitz called and asked what time Schwally and De Fina were supposed to go out and Johnson said, "Right now." (According to Johnson's testimony, it was then 1:30.) Schwally then took the phone and spoke to Leibowitz; shortly thereafter she handed the phone to Johnson and said, "You are going on Mario's run." At or about 1:30 he walked to the bus with Schwally, let the bus warm up for 5 minutes, and told Schwally, "We will stall a little bit and see if he gets here," but De Fina did not arrive by then and they drove to the school, which, according to Johnson's testimony, took about 15 minutes. When they left Respondents' garage at or about 1:40 they did not see De Fina. They were late arriving at the school (at 1:50), according to Johnson's testimony, and the children were waiting outside for them. Later when Johnson returned to the garage he met De Fina and asked him why he was late and De Fina said that he was not late.

Matron Frances Parke, who was employed by Respondent Bellrose during the period in question, testified that during this period she and her driver had an afternoon run to PS 197 and they had to pick up the children at the school at 1:30. In answer to questions from me she testified that she first learned that the pickup time for PS 197 was 1:30 from a "slip of paper" she was given and that it was not possible that, while her bus had to be there by 1:30, De Fina's bus was to be there at a later time "[b]ecause we both had the same type of runs, at school, and it called for 1:30."

Matron Mary King testified that she was employed by Respondent Hillside from September through the first week in October, and during this period she had an afternoon run at PS 197 and she and her driver had to be there at 1:30 to pick up the handicapped children. She also testified that she knew that De Fina's run was due

[14] Schwally had been on the PS 197 afternoon run since school began on September 10 and testified that they had to be at the school by 2 o'clock. It took 10 minutes to drive from the garage to the school, and she and De Fina usually left the garage whatever time they both arrived there—anytime between 1:15 and 1:50, but they usually arrived at the school at 1:50.

[15] A midday run usually operates between 11 a.m. and noon. The "dry run" involves the new driver going on the run with the driver whose run it had been to better learn the route. Johnson testified that on the prior day he had told De Fina to do the dry run on the midday the next day.

there at 1:30. During cross-examination King's story began to evaporate until, by the end of her cross-examination, it became clear that her testimony was worthless. Firstly, King testified that, as regards the PS 197 afternoon run, De Fina "had the run from the beginning"; however, De Fina was originally employed by Respondent Hunter until a few weeks after school began when, due to the hiring preference established by the Board of Education, discussed, *supra*, he was transferred to Respondent Hillside and the PS 197 run. In addition, she testified that her bus had to be at PS 197 at 1:30 so she assumed the others had to be there at the same time. She assumed that, she testified, because "the company" told her that if one bus had to be there all the buses had to be there. When she was asked who from "the company" told her that she answered, "The dispatcher, I imagine." She was then asked:

> Q. Did the dispatcher ever say to you, Mary King, if you had to be there, then Mario De Fina has to be there at the same time?
>
> A. No.
>
> Q. So you really don't know when he had to be there.
>
> A. No, I just knew that bus 47 had to be there at the school at 1:30.
>
> Q. And what was bus 47?
>
> A. My bus.

Finally, in answer to questions from me, King testified that she never witnessed De Fina on his PS 197 run since she did not have this run until January 1980.

Leibowitz testified that on November 14, at or about 1:30, he received a telephone call from Schwally, who said that De Fina was not yet at the garage; Leibowitz asked what the problem was and Schwally said that they had to leave. When Leibowitz asked what time they had to leave, Schwally said that they should have left already. Leibowitz asked her to put Johnson on the phone. He told Johnson to go outside to see if he saw De Fina; when he came back and said that he did not, Leibowitz told Johnson to do De Fina's run. At or about 1:50 De Fina called Leibowitz from the garage and asked what happened. Leibowitz told him that he was supposed to do a midday run[16] and that he was supposed to leave on his regular run at 1:30. De Fina said that he was not late, and Leibowitz told him that he was fired and he would mail him his check.

Leibowitz' testimony regarding the midday run is confusing. He first testified, "I told him three days ago . . . three days before." He then testified, "I don't recall if I told him. I don't recall if Bonnie told him. I don't recall if Richie told him. But I checked with the three people, and they said yes, he was notified of the run change." He then testified:

> Every person I spoke to said to me they told him. That is Bonnie, that is Richie, and that's myself. I can't be any more clear than that. We spoke to him. We told him.
>
> JUDGE BIBLOWITZ: You, yourself told him—
>
> THE WITNESS: Yes.
>
> JUDGE BIBLOWITZ: And you remember clearly?
>
> THE WITNESS: Yes.
>
> JUDGE BIBLOWITZ: What were the circumstances when you told him about the midday run?
>
> THE WITNESS: So he picked up the phone—I said Mario, starting this day, you got a midday run.

Later, during cross-examination, Leibowitz was asked whether the drivers arrange actual dismissal times from the various schools. Leibowitz' answer was, "Absolutely not. That is absolutely wrong. They do not." Leibowitz was then shown the affidavit he had given to the Labor Board which states, "The schedules that I give out to the drivers are retyped versions of Board of Education schedules. Although the runs stated on the schedule for specific times, the bus driver arranges with schools the actual times for dismissal." Leibowitz' explanation was that the Board Agent omitted the words "with our approval" from the affidavit.

Jenny Outcalt, who is employed as an educational assistant at PS 197, testified that the children in her class are emotionally handicapped, and in the afternoon she and the teacher of her class escort the children to the bus and do not leave until the buses with their children on them depart. She testified that dismissal time in the fall of 1979 was 2 o'clock, but the children were placed on the buses anytime between 1:35 and 1:55 when the buses arrive at the school. The reason for this was that, even though dismissal time was 2 o'clock, that was not necessarily the time the children were taken outside; for example (according to Outcalt's testimony), if the weather was nice, the teacher and educational assistant took the children, at or about 1:30 to 1:35, to a park adjacent to the school and when the buses arrived they boarded the children on the buses whether it was 1:35 or 1:55. If the weather was not nice, they waited in the classroom until they saw that the bus had arrived, then they took the children downstairs and put them on the buses. Outcalt also testified that during the 1979-80 school year Respondent Hillside's buses arrived between 1:30 or 1:35 and 2 p.m.

In addition to the above testimony, exhibits were introduced by the General Counsel and Respondent attempting to buttress their positions regarding the dismissal time at PS 197. The General Counsel introduced the schedule that was given De Fina for his run when he began working for Respondent Hillside. The document lists a number of children, their schools, sessions, addresses, and telephone numbers. Typed under these names is:

> Drop
>
> P.S. 197 Beach 9th Street Hicksville Road—8:35
>
> P.S. 104 26-01 Mott Avenue, Far Rockaway-8:40

Handwritten under this is:

> P.S. 197 *2:00* Take home above children
>
> P.S. 104 3:00 Take home above children

[16] Leibowitz' testimony appears to be that De Fina was to perform the midday run, not do a dry run of it that day with Morgan.

De Fina testified that he did not write in the last lines on the form and he assumes that Milberg did. Milberg testified that it was not her handwriting; Johnson testified that it looked like Milberg's handwriting.

Respondent introduced the "trip cards" used by De Fina during his employment with Respondents. All drivers for Respondents are required to fill out one each day. This trip card includes, *inter alia*, places for the drivers to fill in the following: "School Trips Out," "Dismissal Time," and "Passengers." Beginning September 23, the day he was transferred to Respondent Hillside, through November 13, on every trip card which included the PS 197 run (all the trip cards except one) De Fina wrote:

> P.S. 197 1:30
>
> P.S. 104 3:00.

Respondents allege that, as De Fina indicated "1:30" as the dismissal time on the trip cards, that must have been the actual dismissal time at the school. De Fina testified that at one time dismissal time for the school was 1:30; however, when he was transferred to Respondent Hillside's employ, he received the above-mentioned form (the one he assumes was the work of Milberg) which stated that dismissal time for PS 197 was 2. However, he (according to his testimony) always filled in 1:30 for dismissal time by "force of habit." When Milberg was shown the trip card for William Chan, who replaced De Fina on the PS 197 afternoon run on November 15, and who wrote "1:45" under dismissal time, she testified, "The time that is written here is when the driver gets to the school, so he probably got there late." Chan's trip card for November 16 states dismissal time at PS 197 as "2:45."

Respondent cites other reasons for De Fina's discharge in addition to the alleged lateness on November 14. Leibowitz testified that, while De Fina was training the drivers for him, several of the drivers told Leibowitz that they appreciated the training, but that De Fina was driving too fast. Leibowitz "sluffed it off" because he needed De Fina to train the other drivers. Leibowitz testified that on September 28 De Fina had an accident with the bus and Leibowitz told him, "You hold yourself out as a safety instructor, and here you are, you have the first accident in the company. How does that look for all these other guys." He testified that he called Johnson and asked him to investigate the accident. Johnson then called Sister Enid Story, the principal of St. Rose of Lima, a school serviced by Respondent Hunter and the school De Fina had made his pickup at prior to the accident.[17] Sister Enid testified that in late September or early October she spoke with Johnson, Leibowitz, and Milberg. She informed them that she had received several complaints from parents, mainly regarding the delay in children being picked up at the bus stops, but she was most concerned about the accident.[18] Sister Enid further testified that after the accident she asked the parents of her school children who had complaints about the service to write to her about them. When she collected the complaints she called Johnson and he came to the school and discussed the complaints with her. Although three other of Respondent Hunter's buses serviced St. Rose of Lima School, Sister Enid testified that since she had records of which buses make which pickups she found that most of the complaints regarding the late pickup of children involved the same bus as was involved in the accident—De Fina's bus.

On October 6 Sister Enid wrote a letter to the individual at the Board of Education in charge of the Bureau of Pupil Transportation, stating, *inter alia:*

> I am writing on behalf of the children and the parents of St. Rose of Lima School. This year our school is being serviced by a new bus company, the Hunter Bus Company, Rockaway, New York.
>
> After receiving several complaints from parents by phone, concerning lack of safety and a bus accident on September 28, 1979, I asked the parents to commit these complaints to writing. I have read all these complaints and have called the bus company. On October 5th, the same day as I made the phone call, I sat and reviewed these complaints with a Mr. Richard Johnson. Mr. Johnson is the Bus dispatcher for the Hunter Bus Company. He promised to look into the situation and rectify the problem.
>
> I would like this letter to be kept on file at your office as an official notice of a complaint being made to the Hunter Bus Company. If no action is taken by the bus company, you will receive a subsequent letter from me. Upon receipt of this letter I would ask your office to take action.

De Fina testified that after the accident Leibowitz simply told him to "slow down," and De Fina said, "Larry, I wasn't even moving when the man hit me." On another occasion (De Fina could not place the date) Milberg asked him if a child had fallen while riding on his bus and De Fina told her that he did not know of any such incident.

Leibowitz testified that thereafter De Fina received a speeding ticket while driving a bus and he told De Fina, "I cannot believe that you are still working here for me. With all the things and all the complaints that I have gotten." De Fina testified that he received a speeding ticket about the middle of October for driving 49 miles an hour in 30-mile-an-hour zone; he went to court to argue the case on the ground that the only sign posted in the area was a 50-mile-per-hour sign, and the charge was dismissed. He testified that neither Leibowitz, Milberg, nor Johnson spoke to him about this ticket.

Johnson testified that a few days before school began he gave a speech on safe driving to all of Respondents' employees (including De Fina) at which time he informed the employees that "[t]he State Law states the school buses are recommended to travel no more than 35 miles per hour whether posted or not." Johnson also testified that sometime in September he received a tele-

[17] The accident report filed by De Fina states, "Bus was standing still waiting to make a right turn East, car was travelling East making right turn heading South, car skidded into bus before completing his turn."

[18] De Fina drove the St. Rose of Lima morning and afternoon run from September 10 through September 19 and on September 28.

phone call from a parent who said that she observed De Fina driving too fast and he told De Fina to slow down. Johnson also testified that, when he met Sister Enid, most of the complaints in the letters she received from the parents were that the bus started too fast throwing the children all over the bus. Johnson did not know whether any other driver received a speeding ticket during the period in question.

Hunter driver Ivan Parke testified that about the middle of October, while he was driving a bus down Beach Channel Drive, De Fina, who was driving a bus with about 10 to 20 children in it, passed him while driving about 40 to 45 miles an hour and cut in front of him. He reported this to Johnson. He testified, "I wouldn't have said a word if there were no children on the bus. But being there were children on the bus, that reflects a bad name on the bus, all the drivers."

Harry Haroon, who is general manager of the gasoline station in the area that is owned by Leibowitz, and that provides gasoline and other services to Respondents' buses, testified that in or about the beginning of September he was driving his car on 116th Street and he made a right turn onto Rockaway Beach Boulevard—a two-lane road, one lane for each direction. About a block later, while he was driving "hardly" 20 miles an hour, one of Respondents' buses passed him in the left lane. Haroon testified that, at the time, he had his window open and heard it coming prior to the time that it passed him and he also saw the bus in his rear view mirror prior to the time that it passed him. When the bus passed him, Haroon looked to his left and recognized De Fina through the glass on the front door of the bus; there were no children in the bus at the time. He recognized De Fina because prior to that he had come to the station often while he was training other of Respondents' drivers. Afterwards, he reported the incident to Milberg and Leibowitz, who did not comment on the incident.

In addition, there was an incident where De Fina picked up two adults, along with some children, and took them to the school he was going to. He testified that, when he picked up the children, two adults, waiting at the same location, asked him if he were going to the school and he said that he was. He did not ask them any questions. When he arrived at the school, Leibowitz approached him and said, "Who are these people," and De Fina said, "They asked me for a lift to the school. They got in with the kids and I thought they were with them." Leibowitz said, "People are not allowed to ride on the bus, no adults," and De Fina said, "I'm sorry Larry, I didn't know. I am new to the school busing business." He informed Leibowitz that it would not happen again. De Fina could not place the time of the incident, although it must have occurred prior to October 26 as De Fina testified that he and Leibowitz "were good friends at the time."

Leibowitz also testified that sometime in October De Fina returned late from a field trip and was therefore late for his afternoon run. When Leibowitz pointed it out to him, De Fina stated that the teachers on the trip wanted him to drive through the streets. De Fina testified that he was never late for a run and Schwally testified that to her knowledge De Fina did not have a problem with lateness.

IV. CREDIBILITY DETERMINATIONS

I found Milberg to be one of the least credible witnesses I have experienced; as stated, *supra*, her testimony was a catalogue of contradictions. There were contradictions among her testimony at different points in the proceeding, contradictions between her testimony and her affidavit, and contradictions between her testimony and that of other witnesses. For example, she testified that the words "PS 197 2:00" were not in her handwriting, whereas Johnson testified that it looked like her handwriting. In addition, while she was testifying, she looked at Leibowitz prior to answering each question until I warned her to stop doing so.

Although Leibowitz' testimony was more credible than that of Milberg, I would credit the testimony of De Fina over that of Leibowitz. De Fina impressed me as a frank and honest witness; although his memory was far from perfect (for example, his testimony regarding his actions prior to returning to the garage on the afternoon on November 14), it appeared that he was attempting to answer the questions asked of him as truthfully as he could, without "coloring" his answers. Leibowitz, on the other hand, seemed to be "shooting from the hip" with his answers. For example, Leibowitz testified that he informed De Fina of the midday run 3 days prior to November 14; he later testified that he did not recall if he personally told De Fina of the midday run; and, shortly thereafter, he again testified that he personally told De Fina of the midday run. Another reason why I have credited De Fina's testimony is that it is supported by Schwally, whom I found to be an extremely credible and frank witness. Although Johnson, at first, appeared to be a fairly credible witness, I found his testimony and that of Leibowitz regarding the solicitation of cards for Local 118 to be unbelievable (to be discussed more fully *infra*) and I would therefore discredit his testimony when there is a conflict with that of De Fina or Schwally.

V. ANALYSIS AND CONCLUSIONS

It is clear that Leibowitz told the assembly of Respondents' employees on September 6 that he would close the shop if they brought in "a union" or Local 1181 to represent them for purposes of collective bargaining. Even Milberg, Johnson, and Leibowitz testified to that effect, although Johnson and Leibowitz testified that Leibowitz told the employees that he would close the operation rather than accept Local 1181 because of the violence that he associated with Local 1181; even if true, which I do not find, this is not a defense to a threat to close if the employees choose to be represented by a union. I find it unnecessary to make a determination as to whether Leibowitz referred to Local 1181 or any union, and whether Leibowitz threatened to bring the employee responsible for organizing the garage "in front of" the other employees (as testified to by Ortiz and Colognna). Leibowitz clearly threatened to close Respondent's operation if the employees chose to become represented by a union (whether Local 1181 or any other union) and the

statement therefore violated Section 8(a)(1) of the Act. *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969); *Knapp Foods, Inc. d/b/a Hi-Lo Foods*, 247 NLRB 1079 (1980).

As regards the card solicitation and the subsequent execution of the collective-bargaining agreements with Local 118, the sequence of events that Respondents would have us believe is as follows: Johnson learned of the existence of Local 118 from employees of a company owned by his sister-in-law; he called Local 118 and received blank authorization cards from it on Friday, October 26, at or about 4 o'clock. During that afternoon and on Monday morning, October 29, he solicited and received signed authorization cards from 22 to 24 four drivers and mechanics (and the cards are dated between October 26 and October 29); on that same Monday morning, he returned the signed cards to Local 118. *The earliest* that Local 118 could have made its demand upon Respondents therefore was on Monday, October 29, and yet Leibowitz testified that after the proposed contracts and the demand for recognition was made upon him by Local 118 he "took it home and I did some deep soul searching." Whereas in other situations this might be fairly credible, it is completely lacking in credibility by the fact that the contract that Leibowitz signed was executed on the same day, October 29. Additionally, Leibowitz testified that he first heard from Valvo about a week or two prior to this date, long before any of the authorization cards were signed or even received by Johnson. And, finally, Leibowitz gave Rosalie and Martin Gurber the contracts that Valvo left with him for Respondent Hillside and Respondent Bellrose, and these contracts are also dated October 29.

The only portion of this that is credible is Johnson's admitted solicitation of cards from a majority of Respondents' drivers and it is therefore necessary to determine whether Johnson is a supervisor within the meaning of the Act. At the time, Johnson earned between $50 and $111 a week more than the other drivers. Although Johnson does not hire or fire employees, I find that during the period in question he responsibly directed the work of employees in a manner that required the use of independent judgment. Johnson was clearly the man in charge at the garage; although Respondents attempted to portray him simply as an employee who relayed instructions from Leibowitz and Milberg to the drivers, he was clearly more than that. He corrected problems that the drivers had and he dispatched mechanics when buses broke down. In addition, he answered complaints from parents of school children and principals of schools serviced by Respondents. Johnson, on his own, corrected the difficulty that Patrick Morgan was having with the number of children on his bus. In addition, I credit the testimony of De Fina, Colognna, and Ortiz that at the September 6 meeting Leibowitz informed the employees that Johnson was the dispatcher and he would be in charge at the garage. In fact, it is reasonable to believe that with approximately 27 drivers operating out of the garage the operation would require one individual who could responsibly direct the work of the drivers, and this is buttressed by the fact that a few months later Respondents hired a general manager for the garage. I therefore find that Johnson was a supervisor within the meaning of Section 2(11) of the Act[19] and, although there is no specific evidence that Respondents instructed Johnson to solicit the cards on behalf of Local 118, I find that by Johnson's actions Respondents violated Section 8(a)(1) and (2) of the Act.[20] I find, in the alternative, that, as the drivers viewed Johnson as the man in charge of the garage (as Leibowitz had informed them at the September 6 meeting) and as somebody who spoke for management[21] (he relayed instructions from Leibowitz and Milberg to the drivers), Respondents are responsible for his actions in soliciting these authorization cards, and thereby violated Section 8(a)(1) and (2) of the Act.[22]

Having found that Respondents violated Section 8(a)(1) and (2) of the Act by Johnson's solicitation of authorization cards on behalf of Local 118, the issue remains whether Respondents, by entering into the collective-bargaining agreements with Local 118 on October 29, violated Section 8(a)(1) and (2) of the Act, and of this there can be little doubt. As a majority of the authorization cards for each of Respondents' employees were solicited by Johnson, Local 118 did not enjoy the support of an uncoerced majority of Respondents' (or any of Respondents) employees on October 29 and Respondents therefore violated Section 8(a)(1) and (2) of the Act by executing these collective-bargaining agreements with Local 118. In addition, as these collective-bargaining agreements contain union-security provisions, Respondents also violated Section 8(a)(1) and (3) of the Act.[23]

As stated, *supra*, I would generally credit the testimony of De Fina over that of Leibowitz and Johnson; I would also credit De Fina's version of the October 26 incident with Leibowitz wherein Leibowitz asked him to sign a card for Local 118 and told him that, if he did not do so, "You can't work for me." Although Leibowitz denied the incident, and Pezella testified that he saw Johnson give De Fina an authorization card on October 29, I would still credit De Fina for the reasons stated *supra*. I therefore find that by such actions Respondents violated Section 8(a)(1) and (2) of the Act.[24]

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), the Board set forth the rule it will henceforth apply in dual-motive or pretextual discharge cases such as the instant matter: "First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected

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[19] *Jay Dee Transportation, Inc.*, 243 NLRB 638; *Suburban Transit Corp.*, 203 NLRB 465 (1973).

[20] *Mason City Dressed Beef, Inc., et al.*, 231 NLRB 735 (1977).

[21] Johnson informed Respondents' drivers that Leibowitz "might go along with" Local 118 rather than Local 1181.

[22] *Samuel Liefer and Harry Ostreicher, a copartnership, d/b/a River Manor Health Related Facility*, 224 NLRB 227 (1973); *Joint Industry Board of the Electrical Industry and Pension Committee, et al.*, 238 NLRB 1398 (1978); *B-P Custom Building Products, Inc.; et al.*, 251 NLRB 1337 (1980).

[23] *Roberts Electric Co., Inc.*, 227 NLRB 1312 (1977); *Siro Security Service, Inc.*, 247 NLRB 1266 (1980); *Rosa A. Alexander d/b/a A & B Janitorial Service*, 253 NLRB 508 (1980).

[24] *Siro Security Service, Inc., supra; Mason City Dressed Beef Inc., supra; Sanford Home for Adults*, 253 NLRB 1132 (1981).

conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."

As stated, *supra*, I have found De Fina and Schwally, *inter alia*, more credible than Respondents' witnesses in all areas, including dismissal time at PS 197; in addition, I found Outcalt, who is still employed at the school, to be a credible witness. I therefore find that, at the time in question, dismissal time at PS 197 was 2 o'clock. However, that does not end the inquiry; under *Wright Line, supra*, I must first determine whether there has been a *prima facie* showing that De Fina's protected conduct was a "motivating factor" in his discharge. Firstly, what protected activity did De Fina engage in? He refused to sign the Local 118 authorization card when requested to do so by Leibowitz on October 26; in addition, shortly after October 29, he called Local 1181 and, together with other of Respondents' drivers, spoke to fellow employees in a restaurant three or four blocks from Respondents' garage about the advantages of Local 1181 over Local 118. However, there is no evidence that Respondents had knowledge of these activities by De Fina on behalf of Local 1181 and, considering the nature of Respondents' operations (employees away from the garage for a large majority of their work hours) and the number of employees involved, I will not impute knowledge of these activities to Respondents under the "small-plant doctrine." *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959); *A to Z Portion Meats, Inc.*, 238 NLRB 643 (1978). I make this finding even considering Johnson's statements to Schwally on the bus on November 14, and the fact that Johnson's wife and son-in-law are employed as drivers for Respondents, thereby increasing the possibility that Respondents learned of De Fina's activities on behalf of Local 1181.

On November 14, Schwally arrived at the garage between 1:25 and 1:30. This was the usual time that she met De Fina because she asked Johnson where he was, and, when Leibowitz called and asked her what time they go out on their run, she answered, "Just about now." Admittedly, De Fina was not at the garage by at least 1:35, the time that Schwally and Johnson left to go to PS 197. If De Fina arrived just as Johnson and Schwally were leaving they could have arrived at the school by 1:50 (the usual time they arrived according to Schwally's testimony). However, that only left them 10 minutes before they would be late, and when Leibowitz spoke to Schwally he had no way of knowing that De Fina would arrive by 1:45 or 1:50. As Schwally testified that when she and Johnson arrived at the school the children and teachers were already outside, it is reasonable to assume that the weather was nice that afternoon and the teachers took the children outside early (as testified to by Outcalt). De Fina, who had been on this run for about 6 weeks, was aware of this procedure and should not have waited until the last minute before arriving at the garage, even if he were not literally late. What makes this situation more troubling is that, while De Fina was fired, ostensibly, because he arrived at the garage a few minutes late for his run on November 14, William Chan, who replaced De Fina, arrived at PS 197 at 2:45 on November 16 and he was not fired. The General Counsel would allege that this disparate treatment was caused by De Fina's protected activities. But I have found that the protected activity engaged in by De Fina, and known by Respondents, was solely his refusal to execute the Local 118 authorization card tendered to him by Leibowitz. Although it is clear that Leibowitz had a consummate hatred for Local 1181, it must be noted that Patrick Morgan, James Morgan, and Colognna refused to sign Local 118 authorization cards when solicited by Johnson on October 29, and did not join Local 118 until the 30-day period was to expire at the end of November, and Respondents took no action against them. In addition, at the November 1 meeting with Local 118 and Respondents' employees, Colognna spoke against the contract and his employment was not affected. Also of some significance is that on November 14 Respondents had an existing collective-bargaining agreement with Local 118 (although as I have found, *supra*, they were unlawfully executed) containing union-security provisions requiring the employees, including De Fina, to join Local 118 within 30 days. Respondents argue that it had no reason to discharge him to "force him into line" since he would have had to join Local 118 by the end of November regardless, and this is somewhat persuasive, although Respondent might still wish to rid itself of a dissident such as De Fina.

A further question remains: Did Respondent have any other lawful reason to discharge De Fina other than his late arrival on November 14? A number of reasons appear: the accident on September 28 for which Respondents received a lot of "heat" from Sister Enid and possibly the Board of Education (although De Fina testified that his bus was not moving when the accident occurred, it probably caused Respondents some difficulty); the complaints that Sister Enid passed along to Leibowitz, Milberg, and Johnson regarding complaints from her students' parents of late pickups (since this was hearsay testimony on the part of Sister Enid, I have not assumed that the complaints were true); De Fina's speeding ticket (even though De Fina testified that the charge was dismissed, the propriety of driving a school bus at 49 miles an hour is questionable); the uncontradicted testimony of Parke and Haroon that they observed De Fina driving recklessly and informed Respondents of the incidents; and the incident where De Fina picked up two adults, which violated Respondents' or Board of Education rules. Furthermore, it is uncontradicted that Leibowitz was in September aware that De Fina was, at times, driving at an excessive speed because, when De Fina informed him of the September 28 accident, Leibowitz told him to "slow down." All of these incidents occurred prior to De Fina's refusal to sign the Local 118 authorization.

On the basis of all the above, I reluctantly find that the allegation that De Fina was discharged in violation of Section 8(a)(1) and (3) of the Act should be dismissed; reluctantly because of the extremely suspicious nature of the discharge. At first glance it appears that the General Counsel has established the *prima facie* case required by

Wright Line, supra, considering the animus Respondents had for Local 1181, the other unfair labor practices they committed, that the discharged occurred 2 weeks after De Fina refused Leibowitz' request to sign an authorization card on behalf of Local 1181, and that De Fina's dereliction of duty on November 14 was a minor one (if, in fact, there was any dereliction at all). However, when one looks at the remaining portion of the record, and more particularly De Fina's limited protected activities, his work record which included numerous incidents over only a 2-month period, and that three other employees also refused to sign authorization cards on behalf of Local 118 at the same time as De Fina without any consequences, it becomes clear that the General Counsel has not sustained his burden that De Fina's action in refusing to execute the Local 118 authorization card was a "motivating factor" in his discharge. *Wright Line, supra*. I shall therefore dismiss the allegation of the complaint that Respondents violated Section 8(a)(1) and (3) of the Act by discharging De Fina.

VI. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondents set forth above in sections III through V, above, occurring in connection with Respondents' operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Respondents constitute a single integrated enterprise engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 118 and Local 1181 are each labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondents, by Austin Leibowitz, its agent, violated Section 8(a)(1) of the Act by threatening to close its business operation if the employees chose to be represented by Local 1181, or any union, as their representative for purposes of collective bargaining.

4. The Respondents, by Richard Johnson, its supervisor, violated Section 8(a)(1) and (2) of the Act by soliciting its employees to sign authorization cards for Local 118.

5. The Respondents, by Leibowitz, its agent, violated Section 8(a)(1) and (2) of the Act by soliciting an employee to sign an authorization card for Local 118, and threatening said employee with discharge if he failed to sign the card.

6. The Respondents violated Section 8(a)(1), (2), and (3) of the Act by entering into collective-bargaining agreements containing union-security provisions with Local 118 on October 29, 1979, at a time when Local 118 did not represent an uncoerced majority of Respondents' employees in an appropriate unit.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[25]

The Respondents, a single integrated business enterprise comprised of Respondent Hunter Transit Corp., Respondent Hillside Bus Corp., and Respondent Bellrose Bus Corp., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with closing its business operation if they chose to be represented by Local 1181, or any union, as their representative for purposes of collective bargaining.

(b) Giving assistance and support to Local 118 in obtaining authorization cards from its employees.

(c) Threatening its employees with discharge because of their refusal to execute authorization cards on behalf of Local 118.

(d) Recognizing or contracting with Local 118 or any successor thereto, as the representative of any of its employees for purposes of collective bargaining, unless and until said labor organization has been certified by the National Labor Relations Board as the exclusive bargaining representative of such employees.

(e) Giving effect to, performing, or in any way enforcing its contract effective October 29, 1979, or any modification, extensions, or renewals thereof, or any other contract, agreement, or understanding entered into with Local 118, or any successor thereto, relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until said labor organization shall have been certified by the Board as the exclusive representative of employees; *provided*, however, that nothing in this Decision and Order shall require Respondents to vary or abandon any wage, hour, seniority, or other substantive feature of its relationship with its employees which Respondents have established in the performance of this contract, or to prejudice the assertion by employees of any rights they may have thereunder.

(f) Giving effect to checkoff authorization forms executed by its employees on behalf of Local 118.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights them guaranteed by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act:

(a) Reimburse its employees for all fees, dues, or other money deducted from their pay for Local 118 pursuant to the provisions of the collective-bargaining agreements entered into by Respondents and Local 118 on October 29, 1979, or any subsequent collective-bargaining agreement entered into by Respondents and Local 118.

(b) Preserve and, upon request, make available to the Board or its agents payroll and other records necessary to determine the amount due under paragraph (a) *supra*.

[25] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Post at its Rockaway, New York, garage and office copies of the attached notice marked "Appendix."[26] Copies of said Notice, on forms provided by the Regional Director for Region 29, after being duly signed by their authorized representative, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to emqloyees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the consolidated amended complaint be dismissed with respect to the allegations not specifically found herein to be violative of the Act.

[26] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."